

1 UNITED STATES DISTRICT COURT FOR THE
2 EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION, ST. LOUIS

3 COTTER CORPORATION N.S.L.,)
4)
5 Plaintiff,)
6)
7 v.) No. 4:19-MC-00774-AGF
8)
9 UNITED STATES OF AMERICA, et al,)
10)
11 Defendants.)

12 RULE 27 HEARING

13 BEFORE THE HONORABLE AUDREY G. FLEISSIG
14 UNITED STATES DISTRICT JUDGE

15 NOVEMBER 25, 2019

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1 (THE FOLLOWING PROCEEDINGS WERE HAD ON NOVEMBER
2 25, 2019, BEGINNING AT APPROXIMATELY 4:00 P.M., IN OPEN
3 COURT:)

4 THE COURT: Good afternoon. We are here in the
5 matter of Cotter Corporation N.S.L. v. United States of
6 America et al. It is case number 4:19-MC-00774-AGF. And
7 here in the courtroom on behalf of the plaintiff Cotter
8 Corporation is Mr. John McGahren. And do we have another
9 attorney on behalf of Cotter? Is there anyone else on
10 behalf of Cotter on the phone?

11 MR. MCGAHREN: No, Your Honor.

12 THE COURT: And then here in the courtroom we
13 have Phillip Dupre, correct?

14 MR. DUPRE: Yes, Your Honor.

15 THE COURT: And you are here on behalf of the
16 United States; is that correct?

17 MR. DUPRE: Correct, Your Honor.

18 THE COURT: Then we have other people here on the
19 telephone on behalf of the United States; is that correct?

20 MR. DAIN: Yes, Your Honor. This is David Dain
21 on behalf of the United States.

22 THE COURT: Anyone else on the telephone on
23 behalf of the United States? All right.

24 And then we have on behalf of Republic Services
25 Inc., do we have Allyson Cunningham; is that correct by

1 telephone?

2 MS. CUNNINGHAM: That's correct, Your Honor.

3 THE COURT: Anybody else here in the courtroom or
4 by telephone on behalf of Republic?

5 MR. BECK: Your Honor, William Beck on behalf of
6 Republic, Bridgeton Landfill, Allied Services.

7 THE COURT: All right. I had you down for
8 Bridgeton but I didn't have you down for all the others.
9 So it's Republic?

10 MR. BECK: Bridgeton, and Allied Services, along
11 with Ms. Cunningham for all three.

12 THE COURT: Okay. And then on behalf of
13 Mallinckrodt, Mr. Erickson, do we have you here on the
14 phone?

15 MR. ERICKSON: Yes, Your Honor. I'm here with
16 Steve Soden.

17 THE COURT: All right. Anybody else either here
18 in the courtroom or by telephone? Who did I miss here?

19 MR. GREENBERG: Judge, Richard Greenberg. I'm
20 here for EverZinc U.S.A. Inc.

21 THE COURT: I'm sorry, you're here for who -- I'm
22 sorry, I didn't see a third page here. All right. So
23 Richard Greenberg for EverZinc.

24 Did we miss anybody? Is there anyone on the
25 telephone who is having trouble hearing me? Now, I just

1 want to tell you that the folks on the telephone are not
2 going to hear you unless you are at a microphone which
3 makes it real easy for the folks at these two tables but I
4 don't believe that any microphone has been put on that
5 middle table. So just understand, no one is going to hear
6 you when you are speaking unless you come up here and speak
7 at the lectern.

8 So I'm not sure how you all want to proceed. I
9 have to be honest with you, I haven't digested everything
10 that you all filed. I didn't realize that this issue was
11 as controversial as it was until Friday, and I've been
12 pretty tied up today. So I've reviewed as much of this as
13 I had time to review. And I think the first question I
14 have for you all is I'm assuming that we are all in
15 agreement that issues with respect to the attorney-client
16 privilege and the scope of it are matters of state law,
17 yes?

18 MR. MCGAHREN: Your Honor, I have an order that
19 was signed this morning by the --

20 THE COURT: I understand. I just want to take
21 this one at a time. Does anybody contend that issues with
22 respect to the attorney-client privilege are not matters of
23 state law?

24 MR. BECK: We do, Your Honor. This is Bill Beck
25 for Bridgeton Landfill, Allied Services, Republic Services.

1 With respect to the privilege question, Rule 501 provides
2 that federal common law of privilege applies in a federal
3 question case where state law does not supply the rule of
4 decision. The entire purpose of this preservation, the
5 portion of the deposition that's before this Court under
6 Rule 27 is to preserve testimony for claims that will be
7 brought under CERCLA, the Comprehensive Environmental
8 Response, Compensation, and Liability Act under federal law
9 in federal Court, and it's strictly a federal question
10 claim. So our position is that federal law not state law
11 governs the assertion of privilege with respect to this
12 portion of the deposition. It's being taken simultaneously
13 for a state case and this case, but for Your Honor's
14 portion we believe federal law controls because there's no
15 state rule of decision.

16 THE COURT: All right. And do you believe that
17 the federal common law is different than Missouri state law
18 with respect to that?

19 MR. BECK: We certainly think it's different than
20 the state court judge has applied. We think under the
21 federal common law, the Upjohn case, the communications
22 between attorney and client for the purpose of obtaining
23 legal advice are privileged, and when produced that way
24 it's the subject matter of privilege. The state court took
25 a narrow review under Missouri law and ruled only advice

1 between attorney and client is privileged rather than
2 communication for the purposes of obtaining advice. So we
3 think they are different to that degree, Your Honor. I'm
4 not suggesting agreement with the state court judge's
5 decision, I'm saying that's what he's ruled so that would
6 create a conflict.

7 THE COURT: I see. My question is not whether
8 you disagree or agree with the state court judge. My
9 question is whether you are asserting that the applicable
10 law under the federal common law is different than the
11 state law?

12 MR. BECK: I've got to be careful how I answer
13 that because I've got to preserve the position I've taken
14 in the state court. And under that position the answer
15 would be no, but certainly the federal law is clearly under
16 Upjohn that extends to communications to obtain legal
17 advice not just the advice itself. And that by producing
18 such communications there's a live issue of waiver for Your
19 Honor that applies to the federal portion of the
20 deposition.

21 THE COURT: All right. Thank you. Anyone else
22 want to weigh in on that issue?

23 MR. DUPRE: Your Honor, in general we don't
24 believe these questions of which law applies are
25 dispositive, but would say that the question of whether a

1 party has impliedly waived its privilege is one that we
2 believe federal common law applies to and the Court should
3 look to federal court precedent to help decide that
4 question.

5 THE COURT: And were you all present and given an
6 opportunity to participate when the state court judge was
7 making his determination?

8 MR. BECK: The answer is yes as to us, but no as
9 to everyone else. It was just Mr. McGahren and me in that
10 proceeding, Your Honor.

11 MR. MCGAHREN: More over, Your Honor it was
12 Mr. Beck that filed the motion in state court seeking a
13 ruling that he's now questioning.

14 MR. DUPRE: Your Honor, the United States is not
15 a party to the state court litigation, was not at the
16 hearing, did not file anything at the hearing.

17 MR. SODEN: Your Honor, this is Steve Soden at
18 Mallinckrodt, and the same applies to Mallinckrodt.

19 MR. GREENBERG: That is also the case, Your
20 Honor, with EverZinc U.S.A., we were not at the hearing and
21 we're not a party to that litigation.

22 THE COURT: So Mr. McGahren, I'm assuming that
23 your position, based upon what I read in the reply, and I'm
24 assuming that you've got a written order that is consistent
25 with the voice mail notification that you had presented,

1 I'm assuming that your position is that this Court should
2 not reach that --

3 MR. MCGAHREN: No, Your Honor, that's not
4 necessarily our position. Our position is we wanted to
5 have all these issues before this Court. Mr. Beck chose to
6 file the motion that he filed in state court. The Court
7 ruled not in his favor and now he's seeking a second
8 determination. I'm not quite sure as to the scope of what
9 he's seeking. It hasn't been really briefed other than
10 he's looking for all the documents on Cotter's privilege
11 log in the state court litigation, that's my understanding
12 of what he's seeking here.

13 THE COURT: But even if I were to assert estoppel
14 with respect to Mr. Beck, what does that have to do with
15 the other parties who are not parties to that litigation?

16 MR. MCGAHREN: The other parties took different
17 positions and some of the parties didn't take any positions
18 at all, Your Honor, so EverZinc didn't file anything.

19 THE COURT: In state court?

20 MR. MCGAHREN: Oh, I'm talking about here, Your
21 Honor.

22 THE COURT: All right. But some of the parties
23 have taken positions here, for instance Mallinckrodt has
24 filed a position here asserting waiver, correct?

25 MR. MCGAHREN: Yes, Your Honor.

1 THE COURT: And even if I were to determine that
2 some level of estoppel would relate with respect to
3 Mr. Beck's clients, how would that impact the other parties
4 who are here before this Court?

5 MR. MCGAHREN: I don't think it does, Your
6 Honor.

7 THE COURT: All right. But do you want to go
8 ahead and give me that order for whatever it's worth? I
9 mean, it appears to me that I will have to reach this issue
10 notwithstanding that order in light of the fact that there
11 are other parties before this Court who were not a party to
12 this proceeding.

13 All right. So now that I kind of made sure that
14 I had kind of the general lay of the land, I will hear from
15 you Mr. McGahren.

16 MR. MCGAHREN: Yes, Your Honor. Like Your Honor,
17 I haven't had a hearing on a Rule 27 petition, although
18 I've filed quite a few of them over the years.

19 THE COURT: My first one, too.

20 MR. MCGAHREN: Usually people want to perpetuate
21 testimony. This one is a little unique in that it involves
22 a lawyer that represented Cotter Corporation. And this
23 particular lawyer happens to be the only living witness
24 with respect to communications with various federal
25 agencies that occurred back in the early 1970s and related

1 to the disposal of material generated by the United States
2 and Mallinckrodt that ended up in Westlake Landfill.

3 The judge specifically focused in state court in
4 his ruling on a memorandum that was prepared by Mr.
5 McGrath, Ed McGrath is his name. And Mr. McGrath at the
6 time wrote a fairly contemporaneous memorandum describing
7 the history of Cotter's relationship with the Latty Avenue
8 site and their discussions with federal regulators.
9 There's only one sentence in that memo that Cotter sought
10 to protect as attorney-client work product, it was opinion,
11 that's what the judge focused in the state court.

12 THE COURT: As work product or opinion?

13 MR. MCGAHREN: Opinion, Your Honor. And the rest
14 of the memorandum the judge says was not privileged or work
15 product, it's merely a recitation of facts. As I
16 mentioned, Your Honor, Mr. McGrath is the only living
17 witness that can testify to these communications with
18 various federal agencies that related to this disposal and
19 to the decommissioning of Latty Avenue. So that's what we
20 are seeking to preserve his testimony on. We followed the
21 requirements of Rule 27. We have provided a declaration
22 with the anticipated testimony. We went way beyond the
23 requirements of Rule 27 and produced all of the documents
24 that Cotter had produced in the McClurg litigation which
25 was previously before Your Honor. We produced privilege

1 log and we've had numerous conversations with counsel about
2 the logistics of the deposition, where it would take place.
3 Originally we were trying to schedule it up in Maine, we're
4 now doing it down in Florida where Mr. McGrath spends the
5 winter. We think it will take place over two days on
6 December 2nd and 3rd. I'm not clear what Mr. Beck's
7 position on this, but in the state court he withdrew the
8 portion of the motion above and beyond the memorandum.
9 It's the subject of the order. And reserved his right to
10 make objections after the deposition. Frankly, Your Honor,
11 that's what I had recommended in the first place.

12 THE COURT: And I wasn't really sure what that
13 meant, and I wasn't sure what that meant in the judge's
14 order either. So I understand that the judge here is
15 saying that the memorandum itself is not privileged and
16 that the attorney work product part on page four was
17 properly redacted. And where it says here: The remainder
18 of the motion seeking production of McGrath related
19 documents is withdrawn.

20 So does that mean that vis-a-vis Mr. Beck that he
21 was going forward with the deposition without insisting
22 that any documents he believes -- privileged documents that
23 he believes should be produced need to be produced in
24 advance of the deposition?

25 MR. MCGAHREN: I'll let Mr. Beck speak to that.

1 THE COURT: I wasn't sure what that meant.

2 MR. MCGAHREN: With respect to their position,
3 Your Honor, they filed basically the exact motion in state
4 and federal court.

5 MR. BECK: That's fair, Judge. We had filed a
6 motion seeking production of the redacted portion of the
7 1975 McGrath memo, and also seeking the contemporaneous
8 documents on Cotter's privilege log that were on presumably
9 the same subject matter. At the hearing I made a decision
10 to withdraw without prejudice all portions of the motion
11 except as to the McGrath memo which Judge Walsh reviewed in
12 camera and issued this ruling.

13 THE COURT: You mean with respect to the
14 redaction?

15 MR. BECK: Yes, with respect to the redaction.
16 So that was the only thing he had before him to rule.

17 THE COURT: So your client's position was to go
18 forward with the deposition without attempting to obtain
19 the privileged -- what you believed were privileged
20 documents as to which the privilege had been waived?

21 MR. BECK: Correct, in the state case knowing
22 that we were coming here, but also with specific reference
23 at the end of this order that we may reassert the motion
24 once we've laid a testimony of foundation at the deposition
25 that we believe will more likely persuade Judge Walsh.

1 THE COURT: So honestly folks, that's one of the
2 issues that I need to -- I mean, the main issue that I
3 assumed was before me it was whether or not you all are
4 seeking the production of documents in advance of the
5 deposition or whether everybody is comfortable going
6 forward with the deposition trying to establish what the
7 basis is for some of the statements in the memorandum as
8 well as in the affidavit, because in some of these I wasn't
9 totally sure what the basis of the knowledge was or the
10 purpose for which the communication might have taken place.
11 And I assumed that you all would be able to establish that
12 information at Mr. McGrath's deposition. I'm assuming and
13 I understand that Mr. McGrath is elderly and nobody knows
14 what's going to happen tomorrow, but to anyone's knowledge
15 does Mr. McGrath currently have any terminal illness or
16 anything that is going to cause concern about like his
17 likelihood to be around after December 3rd?

18 MR. DUPRE: Your Honor, I cannot speak to
19 Mr. McGrath's health, but if you would allow me to I would
20 like to speak to why we think these issues are appropriate
21 to be resolved prior to the deposition.

22 I think there's really two issues here. One is
23 whether or not Cotter has already waived the
24 attorney-client privilege with respect to the advice
25 Mr. McGrath gave Cotter on disposing of this radioactive

1 material through its voluntary production of this 1975
2 memorandum and the declaration that was signed last April.
3 We would be happy to get into that in detail if the Court
4 would like.

5 In addition, we believe what Cotter is trying to
6 do is set up an advice of counsel type defense. Indeed,
7 this was essentially explicitly said to us that they would
8 like to establish it through Mr. McGrath's deposition
9 testimony that Cotter acted in good faith in depositing
10 radioactive material at the Westlake Landfill. And while
11 we have no objection with respect to Cotter establishing
12 that, that opens up and waives the attorney-client
13 privilege as to whether in fact Cotter did act in good
14 faith and relied on its counsel's advice. In particular,
15 because we don't know when litigation will proceed with
16 Mr. McGrath, we don't believe it will be appropriate to
17 wait five years to see what Cotter puts into its initial
18 pleadings and only then figure out for sure how they intend
19 to use his testimony.

20 THE COURT: Let me take this in two steps. I
21 mean, one step is whether or not Cotter is going to assert
22 a good faith defense based upon Mr. McGrath's advice.

23 MR. MCGAHREN: That's not a defense under CERCLA,
24 Your Honor.

25 THE COURT: All right. And I assume you all can

1 get that position in writing or not in writing from the
2 defendant.

3 MR. DUPRE: Actually, Your Honor, my
4 understanding is, and to be clear there's not a good faith
5 defense to CERCLA liability, but they will be arguing with
6 respect to an allocation of response costs that Cotter
7 acted in good faith and that should affect the allocation
8 of response costs. If Cotter would like to disclaim that
9 argument now, that would be helpful.

10 THE COURT: So that is what I am -- it seems to
11 me that you all ought to be able to determine at least in
12 the near future whether or not Cotter is going to be
13 asserting good faith with respect to allocation of response
14 costs.

15 MR. MCGAHREN: Your Honor, again he was speaking
16 to a defense that they cited with respect to the US v.
17 Exxon case. That is not a defense to CERCLA liability.
18 There are three enumerated defenses to CERCLA liability,
19 that doesn't fall within them. So it's not even on point.
20 We're trying to elicit facts.

21 THE COURT: I understand, but does it then follow
22 that Cotter is not making such a good faith argument?

23 MR. MCGAHREN: We want to use all the facts
24 elicited in the case to develop our own inequitable
25 allocation case. I don't know what that would be at this

1 point, Your Honor. I haven't gotten all the facts from all
2 the parties. We have no discovery against the United
3 States. We're simply trying to preserve testimony of a
4 witness who was on the grounds --

5 THE COURT: But in the context of an equitable
6 allocation argument, would Cotter essentially be asserting
7 an advice of counsel, effectively asserting?

8 MR. MCGAHREN: Not advice of counsel, no Your
9 Honor, we would not be asserting that. We might be
10 asserting facts obtained from Mr. McGrath.

11 THE COURT: I understand. And what is it that
12 the Government believes Cotter would be arguing?

13 MR. MCGAHREN: Excuse me, Your Honor, one more
14 thing I want to say. I think when the testimony is taken
15 it will be borne out that Mr. McGrath was not involved in
16 advising on disposal at Westlake Landfill, but that can be
17 determined at the deposition.

18 MR. DUPRE: Your Honor, Cotter has set forth in
19 both its petition and in Mr. McGrath's declaration legal
20 conclusions by Mr. McGrath that they want to elicit at his
21 deposition. For instance, in their petition itself in
22 paragraph five they say: Mr. McGrath has factual knowledge
23 of federal regulations governing the leached barium sulfate
24 that was dumped in Latty Avenue. The petition also asserts
25 that Mr. McGrath is going to establish based on personal

1 knowledge that Cotter's license with Atomic Energy
2 Commission allowed Cotter to dump this leach barium sulfate
3 at the Westlake Landfill.

4 Mr. McGrath's understanding of what the law was
5 at the time is only relevant to the extent that he advised
6 his client, Cotter, that those activities were legal.
7 Obviously Mr. McGrath cannot give expert testimony as to
8 what the law was, that is the province of the courts. If
9 he wants to testify that he thought the disposal of leach
10 barium sulfate at Westlake Landfill was permissible under
11 AEC regulations, that's only relevant again if he told his
12 client and his client relied on that. And we think that's
13 clearly what Cotter is trying to establish here that his
14 client worked with their counsel and acted in good faith.
15 And we believe that it would be unfair to essentially let
16 them hide the ball and not let us ask follow-up questions
17 on these quote/unquote factual statements about what the
18 law was at the time.

19 MR. MCGAHREN: Your Honor, there were only two
20 documents on Cotter's privilege log that predate the
21 disposal at Westlake Landfill that pertain to Mr. McGrath.
22 So I just want you to be aware of that, Your Honor. But in
23 terms of hiding the ball, Mr. McGrath is going to testify
24 that he told the United States and the United States was
25 fully aware of the disposal that was ongoing at Westlake

1 Landfill, and they don't want that to be out.

2 THE COURT: All right. I don't know that I still
3 have gotten an answer to the question that I asked. My
4 question is what is it with respect to Cotter's announced
5 intention to make an equitable allocation argument -- am I
6 stating that correctly?

7 MR. MCGAHREN: Yes, Your Honor.

8 THE COURT: What is it that the United States is
9 claiming would give rise to a waiver of any attorney-client
10 privilege were Mr. McGrath's testimony to be elicited?

11 MR. BECK: Yes, Your Honor. I think it's
12 important to note a party can make essentially a good faith
13 argument that they acted in good faith. And to the extent
14 they use their counselor's testimony and advice to make
15 that, that constitutes an implied waiver of the privilege
16 even if it is not actually a pure defense to liability. So
17 here, as we understand it and as I think is very clearly
18 set forth in the declarations by Mr. McGrath, they are
19 going to argue that Cotter, because it relied on the advice
20 of its attorney, should have to pay less money to clean up
21 the Westlake Landfill than other parties who are also
22 liable at the site.

23 THE COURT: But that is the question that I
24 believe you all can establish one way or the other. Now,
25 can we all agree that one can have conversations with one's

1 attorney that are not privileged communications?

2 MR. DUPRE: Of course, Your Honor.

3 THE COURT: All right. So an attorney may well
4 be involved in discussions with third parties, including
5 third party regulators?

6 MR. DUPRE: Correct, Your Honor.

7 THE COURT: And the discussions that that
8 attorney has with the third party regulator, including
9 reporting back to the client what the third party regulator
10 said, are not privileged?

11 MR. DUPRE: Your Honor, I would disagree
12 slightly on this last point. I think likely, although we
13 don't know, when parties -- when a lawyer recounts
14 something to his client and says I met with the regulatory
15 agency and he didn't answer my question or whatever it is,
16 the factual information, usually that's going to be coupled
17 with the attorney's legal advice about that, what that
18 statement --

19 THE COURT: Well, maybe so, but the party is
20 either seeking to use that legal advice or not seeking to
21 use that legal advice in connection with the defense here.
22 So are you saying to me that if there is litigation ongoing
23 and the client authorizes the attorney to go make a
24 settlement -- well, to go make some form of request to the
25 other party, and they go and make that request to the other

1 party, and the other party says: No. Forget it. Not
2 doing that. And the attorney comes back and reports to the
3 client the party said: No. Forget it. Not doing that.
4 That -- and they thereafter engage in a discussion about
5 what the attorney's advice should be in light of that
6 response. Are you telling me that the client -- the
7 attorney's statement to the client reporting what was said
8 is privileged? And if so, give me the case that you are
9 relying on for that proposition because I don't buy it.

10 MR. DUPRE: Your Honor, generally speaking the
11 facts -- and I think this is something that is relevant
12 here -- most of the substantive facts that are put forth in
13 Mr. McGrath's declaration are actually just him citing to
14 documents and saying this document is authentic and says
15 what it says. We have no problem with Mr. McGrath
16 authenticating documents, but he diverge from simply
17 confirming the authenticity of communications with the
18 regulator in this case, the AEC, and says for instance in
19 paragraph four of his declaration: My review of the then
20 existing AEC regulations combined with my years of
21 experience in dealing with the AEC in such matters
22 indicated that diluting the leach barium sulfate with soil
23 to, quote, unimportant quality and quantities was
24 permissible. And then he cites to the code of federal
25 regulations. That statement there, which is clearly

1 testimony they want to elicit, is Mr. McGrath's legal
2 opinions. And again, this information is only relevant if
3 it was communicated to his client.

4 I guess to directly answer your question, I think
5 there are some circumstances in which what -- while the
6 underlying facts of a communication from a third party to a
7 lawyer are clearly not privileged, I think the case law
8 says that when a lawyer communicates that you can't sort of
9 pick and choose the content of those communications. So if
10 the lawyer is testifying as to half of his conversation
11 with his client, I told the client X, we actually do
12 believe that in many cases that will lead to a waiver of
13 the second half of that conversation. But again here, I
14 think just peaking beneath the surface of these
15 declarations makes clear that if all Mr. McGrath is going
16 to testify on, I was at a meeting with a third party, this
17 third party said X, we wouldn't be here today. It is other
18 parts of the declaration including in the 1975 memo where
19 Mr. McGrath states, quote, that, you know, by way of
20 commentary we note the following, and then gives -- it's on
21 page eight.

22 THE COURT: It's at the end of the '75 memo.

23 MR. DUPRE: Again, Mr. McGrath's commentary on
24 the facts in 1975 --

25 THE COURT: Paragraph A and B at the end of page

1 eight.

2 MR. DUPRE: Again, while it's true some of these
3 facts in the 1975 memo we would concede, to the extent he
4 had personal knowledge he can testify as to that. But
5 other parts of this, including his commentary, contain
6 privileged communications or he learned through privileged
7 communications by his client.

8 So ultimately, Your Honor, we believe that if
9 they are going to elicit testimony to argue Cotter acted in
10 good faith relying on the advice of their attorney and that
11 therefore they should have a lower allocation of response
12 costs, which I think clearly they intend to do, then we
13 should be able to ask follow-up questions and have the
14 finding that there has been a waiver of privilege.

15 As to whether or not there's any harm in going
16 ahead and taking that deposition for these next two days
17 and then having further motions practice after that
18 deposition --

19 THE COURT: Well, that is what seemed to be a
20 better course of action to me at this moment, because --
21 and Mr. McGahren, I don't mean to cut you out of this
22 discussion.

23 MR. MCGAHREN: I'm enjoying the discussion, Your
24 Honor.

25 THE COURT: I know that this is your motion and I

1 am going to allow you to speak, but it seems to me that
2 during the course of the next week or so, you all could
3 have some discussion with respect to how Cotter intends to
4 use the testimony of Mr. McGrath. And while I understand
5 that you all may not get to these points for years in the
6 litigation, presumably if Cotter makes that representation
7 now and in some fashion limits the use of Mr. McGrath's
8 testimony, and four years from now when it becomes
9 relevant, if in fact Mr. McGrath is no longer available,
10 maybe he will be available as a witness, maybe he will be
11 here in wherever in court to testify -- please tell me it
12 won't be here -- so maybe he will be available to testify.
13 But if he's not, then I would presume that Cotter is going
14 to be limited to the use of Mr. McGrath's deposition in
15 that manner based upon the representation that it is making
16 that everyone else is relying upon in that deposition. So
17 that's one issue.

18 And if in fact when -- if Cotter is unwilling to
19 make any such representation or the representation that
20 Cotter makes is something that one or more parties here
21 believe gives rise to a waiver akin to the type of waiver
22 that would occur if one had an advice of counsel defense
23 upon which they were relying, then we would be in a
24 position to address that issue. But at this moment in time
25 I don't know that you all have really had the discussion

1 necessary to get a clear picture on how Cotter intends to
2 use the testimony and whether in fact it is willing to make
3 a representation as to how it would use that testimony.
4 That's one issue.

5 Second issue, it appears to me that if we were to
6 go forward with the deposition which you all are going to
7 do anyway on December 2nd and 3rd, correct?

8 MR. MCGAHREN: Yes, Your Honor.

9 MR. BECK: We're certainly planning to attend.

10 THE COURT: All right. It seems to me -- and I
11 have personally lots of questions here. As I read through,
12 for instance, the affidavit, there were numerous paragraphs
13 in there where I said, okay, that is just a fact. On this
14 day I did this. I had this conversation with a third party
15 and this is what was said. Or I sent this letter or I
16 received this letter. Or on date X I advised the
17 regulators that this was what Cotter intended to do. Those
18 are matters upon which Mr. McGrath would have personal
19 knowledge. They would not typically fall within the
20 attorney-client privilege, and I think his testimony with
21 respect to those matters could be preserved.

22 There are other questions where, I mean, so for
23 instance, I look at paragraph 23 of the affidavit which
24 says to me, faced with no other viable options Cotter
25 decided to mix the 8,700 tons of LBSR with approximately

1 39,000 tons of soil to dilute the amount of uranium in the
2 total mixture to less than the regulated activities. Well,
3 what's the basis of Mr. McGrath's knowledge on that point?
4 What is the basis for what purpose did he obtained that
5 knowledge? For what purpose is that information being
6 provided in the affidavit? Those I think would be very
7 important questions for me to have the answer to that I
8 don't have the answer to right now, which I assume counsel
9 would be able to determine during the course of the
10 deposition. Which would then put us in a position to make
11 a determination with respect to waiver, having received
12 that information.

13 MR. MCGAHREN: We're not looking to preclude any
14 of these counsel from asking whatever questions they want,
15 Your Honor.

16 THE COURT: And with that type of questioning I
17 believe that we would have such a record just because as I
18 go through this affidavit most of the items that I see do
19 not cause me concern with respect to attorney-client
20 privilege. I'm just telling you what I felt as I read it.
21 Because they were the kind of fact -- relating of factual
22 events that occurred that involved third parties.

23 MR. BECK: May I respond to that?

24 THE COURT: You may.

25 MR. BECK: We have taken the position that the

1 production of the 1975 memo itself is a waiver of privilege
2 because the memorandum as a whole is an attorney-client
3 communication. It was written by Mr. McGrath as lawyer to
4 Mr. Marcott who is the chief decisionmaker at Cotter, his
5 client, in 1975. So the whole document is at its essence
6 attorney-client communication. It also recites in three
7 separate places, which are the last paragraph on page one
8 and the second and fourth paragraphs on page six.

9 THE COURT: Let me get there. Okay. Go ahead.

10 MR. BECK: It also recites at the bottom of page
11 one a specific conversation that Mr. McGrath had with
12 Cotter --

13 THE COURT: Yes, I had noted that.

14 MR. BECK: -- Preliminary to -- well, presumably
15 for the purpose of information to do his job as a lawyer.
16 And then on page six in both the second and fourth
17 paragraphs there's additional instances where Mr. McGrath
18 specifically describes conversations he had with his client
19 in this memorandum. So the memorandum contains
20 attorney-client discussions, at least those three. I would
21 say it contains others where he couldn't be reciting what
22 Cotter knew, felt, believed, or why it did something unless
23 his client told him that, so inherently those are
24 attorney-client communication.

25 The entire body of that was incorporated into an

1 attorney-client communication that Cotter voluntarily
2 produced, which is the memo. And then the memo was adopted
3 in paragraphs 35 and 36 of the declaration in 2019 as an
4 accurate expression of what had occurred in this time frame
5 between the late 1960s and early 1970s when Cotter made the
6 decision to send licensed atomic material to my client's
7 landfill.

8 And so all of that we think constitutes a waiver.
9 And all of those communications including the ones factual
10 are part of an ongoing conversation so that Mr. McGrath can
11 work with them on the question of whether or not this
12 supposed dilution to below what he called a regulated
13 quantity or regulated threshold under the Atomic Energy
14 Act, it was all part of that conversation, which inherently
15 was advice. So we think there's been a waiver now. We
16 also think, as Your Honor does, there'd be a much better
17 record on the issue after the deposition. And it's
18 perfectly fair with me if Your Honor prefers to reserve the
19 issue for then.

20 I would ask for two things in that respect, and
21 one is, just so the Court retains jurisdiction to decide
22 it, and the Court provides that if Your Honor determines
23 that based on the total of what we have now plus what we
24 have at the deposition, there's something new that should
25 be disclosed to us from the privilege log, then we'd have

1 the opportunity to ask Mr. McGrath questions about that.
2 His deposition wouldn't be closed until that determination
3 had been made one way or the other. No motion or denied
4 motion or granted motion, and we finish the deposition.

5 THE COURT: Mr. McGahren, does Cotter have any
6 objection to proceeding in that fashion?

7 MR. MCGAHREN: Just a question. What if he dies
8 before the next proceeding?

9 THE COURT: Then you all will have to make a
10 determination, some judge some day will have to make a
11 determination with respect to whether that deposition can
12 be used or not, because that would require -- if you all
13 moved forward with the understanding that you would
14 expeditiously make whatever additional record you wanted to
15 make following his deposition so that any follow up would
16 occur again promptly. But if in fact he died before that
17 then I would, if everybody agreed, that I would have the
18 ability to do the follow up, I wouldn't be able to make a
19 determination with respect to whether there has been a
20 waiver. If there has been a waiver, then Cotter would have
21 to produce additional materials to the parties. And some
22 other day some judge who is involved in your litigation,
23 which hopefully will not be me, will make the determination
24 with respect to whether the deposition of that absent party
25 can or cannot be used.

1 MR. MCGAHREN: And if I can understand a little
2 more from Mr. Beck, the deposition will clear up just what
3 he said. Basically what he was talking about was advice
4 with respect to disposal of materials in Westlake Landfill
5 proactively. I think the deposition will clear that up.

6 MR. BECK: And I just wish, Your Honor, to hold
7 the deposition open and not conclude it if there is a
8 motion filed to be filed, which is normally the typical
9 procedure.

10 THE COURT: Right. And that's really the issue
11 is whether Cotter and the other parties here are agreeable
12 to proceeding in that fashion.

13 MR. MCGAHREN: With respect to the scope of the
14 waiver that Mr. Beck is seeking, at this point I'm a little
15 confused.

16 THE COURT: The scope of the waiver?

17 MR. MCGAHREN: The scope of waiver that he laid
18 out in his papers.

19 THE COURT: Well, I think Mr. Beck's position is
20 that by disclosing this 1975 memorandum which he believes
21 is advice of counsel, true?

22 MR. BECK: Yes.

23 THE COURT: That the attorney-client privilege
24 with respect to at least -- now you all know the facts here
25 and I don't -- but at least with respect to clean up Latty

1 Avenue storage site, would be waived.

2 MR. BECK: I would say it's broader than that
3 because the memo despite its title discusses the propriety
4 of sending the leach barium sulfate residue and dirt to my
5 client's landfill, the Westlake Landfill. That's part of
6 the subject matter of the memo, that's part of the subject
7 matter we say is waived.

8 THE COURT: But I understand that you all would
9 be going forward and taking the deposition to establish
10 some of this information on a more micro level?

11 MR. BECK: Correct, Your Honor.

12 THE COURT: The who, the what, the where, the
13 why, the how, and then present both the large and the
14 smaller privilege potential waiver issues to me.

15 MR. BECK: Correct, Your Honor.

16 MR. MCGAHREN: I just want to be clear that the
17 scope he is seeking is limited to Mr. McGrath's
18 communication with Cotter.

19 THE COURT: I don't know if that's true or not.
20 I don't know. I mean, the question is if Mr. McGrath, if
21 you have waived the attorney-client privilege with respect
22 to a particular issue, I don't know that it would
23 necessarily be a single attorney specific. I think that
24 would really depend upon what was going on and how defined
25 different parties' roles were. I don't know that I can

1 categorically say yes or no.

2 MR. MCGAHREN: The papers that were submitted he
3 was seeking the 40 documents off the privilege log that was
4 provided.

5 THE COURT: And I'm assuming that those included
6 documents that were not with respect to Mr. McGrath? Or
7 are those all McGrath documents?

8 MR. MCGAHREN: They're not all McGrath documents.

9 MR. BECK: I think actually we were looking for
10 the 40 documents of more than 40 on the privilege log that
11 did involve Mr. McGrath. But I agree with Your Honor that
12 if there is a waiver it goes to the subject matter which
13 may not be limited to a single witness.

14 THE COURT: It may or may not be?

15 MR. BECK: May or may not.

16 THE COURT: But right now I don't know what
17 Mr. Beck's (sic) statement is with respect to the scope of
18 the privilege.

19 MR. MCGAHREN: We have his brief, Your Honor.
20 That's what we know.

21 THE COURT: All right. And does that affect your
22 determination with respect to whether to proceed?

23 MR. MCGAHREN: We want to proceed, Your Honor.

24 THE COURT: Okay. You do want to proceed
25 regardless?

1 MR. MCGAHREN: Yes, and he can raise his issues
2 after the deposition.

3 THE COURT: All right. So I encourage you all to
4 have discussions with one another with respect to how
5 Cotter anticipates it would use the testimony of
6 Mr. McGrath.

7 MR. MCGAHREN: Your Honor, just so it's
8 absolutely clear, we would be using it in the CERCLA cases
9 which we signed tolling agreements for. We're not relying
10 on advice of counsel defense because that's just not a
11 defense to CERCLA liability in any form I've ever heard of.
12 I've never even heard of anyone asserting it in a CERCLA
13 case. And there's toxic tort cases out there as well, Your
14 Honor, the Strong case.

15 THE COURT: The United States is clearly
16 unsatisfied by this statement by you, and so I am going
17 to --

18 MR. MCGAHREN: He went into equitable allocation,
19 which is not a defense. Equitable allocation is a very
20 broad topic which is left to the discretion of the district
21 court judge who could apply equitable factors in
22 determining parties' respective shares of responsibility.
23 And that involves the facts and we are trying to elicit the
24 facts.

25 THE COURT: All right. I understand. But if the

1 facts also include that Mr. McGrath told me this was okay,
2 right?

3 MR. MCGAHREN: I don't think that's going to be
4 the case.

5 THE COURT: That's why I want you all to talk
6 about it. All right. I want you all to have that
7 discussion so that --

8 MR. MCGAHREN: He's going to testify that he told
9 the United States --

10 THE COURT: -- So that the United States can
11 have -- can be in a position to make a legal argument, if
12 it chooses to, that use of that testimony -- and I think we
13 would all be better advised with respect to that argument
14 once we know what the testimony is. Now, we know more than
15 we usually know because we have this affidavit and we have
16 this memorandum.

17 MR. MCGAHREN: And all the documents that most of
18 them say Mr. McGrath on them.

19 THE COURT: And so I want you all to speak with
20 one another about how Cotter intends to use the testimony.
21 And if that leaves open questions by the United States then
22 you can ask Mr. McGrath those questions, and presumably you
23 all can reach some level of definition as to how the
24 testimony is going to be used, at least by the plaintiff.
25 You all may decide you have your own uses of that testimony

1 as well. And then you would be able to make any additional
2 waiver argument that you would, such that, well if the
3 defendant, if Cotter uses the testimony in this way that's
4 fine, but if Cotter attempts to use the testimony in this
5 way, we believe that would constitute a waiver which would
6 allow us to see further documentation and ask further
7 questions of Mr. McGrath with respect to these matters. If
8 Cotter says I'm not doing that, then that could be stated
9 on the record and presumably would constitute a limitation
10 of Cotter's use of it, and we wouldn't have to get into
11 those other issues. Is that fair or am I missing
12 something?

13 MR. BECK: That is a good application of the
14 fairness doctrine which is what I think we're talking about
15 here. If they use attorney-client communication as a sword
16 they can't use them as a shield is the way put by some
17 courts. I just want to make sure that I'm on record saying
18 I agree with Mr. Dupre, that in an equitable allocation
19 proceeding among the three parties the United States has
20 identified as potentially liable to clean up the Westlake
21 site who are Cotter Corporation, Bridgeton Landfill, and Mr
22 Dupre's client, the United States Department of Energy
23 fault is an important factor. And Cotter might assert,
24 would be expected to assert that it acted in good faith and
25 was not at fault based on largely on what Mr. McGrath may

1 says in the declaration, in the memo, and may say at
2 deposition --

3 THE COURT: But can we reach an understanding
4 that if the reason Cotter is relying on what Mr. McGrath
5 says at his deposition is because Mr. McGrath testifies I
6 told the regulators X, Y and Z. We thereafter proceeded in
7 that fashion and no regulator ever came to me and told me
8 that was a problem, or regulator told me, oh, okay, that
9 that is different than Mr. McGrath saying, look, I've
10 looked at all these regulations and I think this is okay
11 for you to do.

12 MR. BECK: The discussion with the regulator's
13 entirely unprivileged, Your Honor.

14 THE COURT: All right. So, I don't think we know
15 exactly what Mr. McGrath is going to say. If I am
16 understanding Mr. McGahren correctly, and I have a lot of
17 leaps here since I've hardly permitted him to speak, his
18 position is that Cotter is relying on nonprivileged
19 facts.

20 MR. MCGAHREN: Yes, Your Honor.

21 THE COURT: Is that correct?

22 MR. MCGAHREN: Yes, Your Honor.

23 THE COURT: And so after that deposition is
24 taken, I think that you all will be in a better position to
25 look at what has been offered and say is this what you're

1 relying on, because if so, we don't know the basis for it,
2 or whatever the problem may be.

3 MR. BECK: Yes, Your Honor, that's better.

4 MR. DUPRE: If I may, Your Honor, generally I
5 take the approach you've laid out is a good one. I think
6 one of the big issues for the United States -- and to be
7 clear I also represent EPA in this matter as well with my
8 colleague David Dain on the phone -- is that we really are
9 to be perfectly honest unclear as to how Cotter intends to
10 use the testimony it elicits later and brought this because
11 we thought it was unclear of the petition. And one thing
12 that I think could be helpful, while I don't think we need
13 any sort of orders from the Court, I think if Cotter could
14 commit here to, for instance, sending us a letter by
15 Wednesday saying we intend to use Mr. McGrath's testimony
16 to support the following arguments or however they intend
17 to use it would be helpful to make sure we have that back
18 and forth before the depositions start six days from now.

19 MR. MCGAHREN: I can't predict the future, Your
20 Honor, I just can't do that. I don't know what lawsuits
21 the United States is going to file. All we're looking to
22 get out of this deposition is facts from the only witness
23 who talked to the regulators at the time period of
24 interest.

25 THE COURT: I understand what you're saying, but

1 again I think that would be easier for the parties to
2 attempt to address after the deposition's been taken.

3 MR. DUPRE: Understood, Your Honor.

4 THE COURT: All right.

5 MR. BECK: I agree, Your Honor. I have one other
6 point when we get done with all the points we're talking
7 about.

8 THE COURT: So what I would like to do is for you
9 you all to go forward and take this deposition. And I
10 assume that Cotter is going to permit -- so for example,
11 some of the things that we have talked about. So in
12 paragraph 21 where he says this was the first time Cotter
13 learned of AEC's policy. I assume that Cotter is going to
14 permit counsel to ask Mr. McGrath what the basis is of that
15 statement.

16 MR. MCGAHREN: Yes, Your Honor.

17 THE COURT: Because if the basis of that
18 statement is, well, based upon all my conversations with
19 Cotter that we were having are X, Y, Z, there may be
20 different waiver analysis than otherwise.

21 MR. MCGAHREN: Your Honor, my concern is there's
22 going to be a battery of lawyers asking this 86 plus year
23 old man questions. They are going to have a full and fair
24 opportunity to ask questions. We've laid out the
25 anticipated testimony which is what we are required to do

1 under Rule 27. We can deal with any follow-up issues
2 after.

3 THE COURT: Right. And the only reason why --
4 that's why I've been trying to focus on the affidavit more
5 than the memo, because there are statements in this
6 affidavit most of which caused me no concern. But there
7 are statements in this affidavit that do cause me some
8 concern with respect to attorney-client privilege issues.
9 And I would be in a better position to analyze whether
10 there is or is not a waiver once I hear the testimony. And
11 I'm assuming that when you say you have laid out the
12 testimony you expect to elicit, that that is the testimony
13 as contained in this affidavit?

14 MR. MCGAHREN: Your Honor, that's the witness's
15 declaration.

16 THE COURT: Right. And so that has already been
17 produced to the parties and presumably Cotter has already
18 had a full and fair opportunity to review that affidavit
19 and made a determination before it was produced that it
20 didn't believe that the attorney-client privilege was being
21 waived --

22 MR. MCGAHREN: Yes, Your Honor.

23 THE COURT: -- By any of the statements in
24 that.

25 MR. MCGAHREN: I don't decide that issue, Your

1 Honor, but we did review it.

2 THE COURT: Right. So I do think that there are
3 statements in here that you know nobody is going to have a
4 problem with saying that on X date I sent this letter to
5 the regulator and this is a true and correct copy of that
6 letter. I assume that we're not going to have any issues
7 with respect to that and that it is very appropriate for
8 Cotter to be attempting to elicit this testimony because it
9 may be the only way to properly establish the foundation
10 for some of these records at this stage. And I assume that
11 there will not be any unreasonable intense grilling of
12 Mr. McGrath with respect to that.

13 MR. BECK: I'll go you one further, Your Honor,
14 and say that if at the end of the deposition, which is two
15 days, if Mr. McGahren feels somebody has abused
16 Mr. McGrath, to bring it to the Court's attention with a
17 motion to terminate or limit.

18 THE COURT: Well, you all always know you have
19 that opportunity.

20 MR. BECK: We won't.

21 MR. MAGAHREN: I don't think that's going to be
22 an issue here, Your Honor

23 THE COURT: No, I don't either. I mean, honestly
24 you all are professionals and I'm assuming that we are all
25 mindful of the context here and of the witness, and that

1 there are paragraphs in this affidavit that I believe
2 reasonably give rise to follow-up questioning to determine
3 the source or the information or the purpose so that the
4 parties can make whatever fair arguments with respect to
5 waiver of the privilege that they wish to make.

6 MR. GREENBERG: We agree, I think, on the
7 approach. We probably agree also on the general rule in
8 terms of the communications. But when you look at the
9 declaration, as you've pointed out, there are some
10 paragraphs here that cry out for attorney-client
11 information. And I specifically want to direct the Court
12 to paragraph 24 when Mr. McGrath states that he understood
13 that mixing toxic, hazardous, radioactive material with
14 soil was appropriate under the rules. What it doesn't say,
15 of course, is whether he communicated that information to
16 anyone. And we will be asking those questions and
17 Mr. McGahren may well be asserting attorney-client
18 privilege at that point and we'll be back here on that very
19 issue.

20 THE COURT: Well, and that could be and that's
21 why I thought we would be in a better position to make a
22 determination with respect to some of these. Because there
23 are a few statements in here that -- in the affidavit, just
24 so that I'm clear -- where I asked myself, so is
25 Mr. McGrath purporting to testify as an expert witness.

1 And if what Mr. McGrath is offering here is an opinion
2 based upon his knowledge, but he was not retained by Cotter
3 to make that assessment for Cotter, he was retained rather
4 to have these communications, and this is his opinion but
5 he was not retained by Cotter to offer that opinion and did
6 not offer that opinion to Cotter, we have a very different
7 analysis of the issue then if in fact he arrived at that
8 opinion and shared that opinion with Cotter prior to these
9 actions being taken by Cotter. Because if what it is is an
10 expert opinion that he has come to now, then some judge
11 later can decide whether Mr. McGrath has been properly
12 noticed as an expert witness and whether that expert
13 opinion should be permitted.

14 If instead these are opinions that Mr. McGrath
15 was retained to reach and he shared those opinions with
16 Cotter, we may have a very different analysis with respect
17 to privilege, and then there may well be a waiver and the
18 scope of that waiver is something we will have to
19 determine. All right?

20 MR. GREENBERG: Yes, Your Honor.

21 THE COURT: And I can't tell from paragraph 24
22 where he says that my review of the regulations combined
23 with this indicated that diluting that was permissible.

24 MR. GREENBERG: Frankly, if it's his opinion and
25 it's not communicated to anyone, it's irrelevant. But the

1 questions at the deposition are going to go to whom he
2 communicated that with. If Mr. McGahren then asserts
3 attorney-client privilege, we will be back on that issue,
4 obviously.

5 THE COURT: Except if the only person he
6 communicated it to was the regulator, then that's not a
7 waiver either.

8 MR. GREENBERG: Correct.

9 THE COURT: All right.

10 MR. MCGAHREN: Thank you, Your Honor.

11 THE COURT: All right. Now Mr. McGahren, I
12 haven't let you talk very much and sometimes that's a wise
13 thing to do, but is there anything you wish to offer
14 further?

15 MR. MCGAHREN: Not at this time, Your Honor.

16 THE COURT: So my understanding is that the
17 parties are going to proceed with this deposition on the
18 dates scheduled. And that the parties will all conduct
19 themselves very professionally, and will not be
20 unnecessarily quizzing Mr. McGrath with respect to matters
21 that are simply fact matters, but that the parties will not
22 be prevented during this deposition to the extent they are
23 being faced with things like paragraph 24 or paragraph 23
24 from inquiring as to the basis of the opinion reached. For
25 instance, what was the source of the information? Was that

1 from the client and for what purpose was it obtained? Or,
2 the nature of how certain matters were communicated to the
3 client; in other words, was this opinion in paragraph 24
4 related to the client, and if so, when and how and for what
5 purpose so far as Mr. McGrath understood. Is that fair,
6 Mr. McGahren?

7 MR. MCGAHREN: I'm fully expecting that. Thank
8 you.

9 THE COURT: Now you had another matter
10 Mr. Beck.

11 MR. BECK: I do have one, Your Honor. And
12 certainly, let me say that we don't regard ourselves as
13 bound to limit ourselves to the information Cotter seeks.
14 We intend to ask Mr. McGrath about other things that he
15 knows personally about the case that are unprivileged, but
16 if we ask any questions that come across as difficult
17 questions, we will certainly ask them cheerfully and
18 professionally and be very nice to Mr. McGrath when we do
19 it.

20 I do have a question about the sequence for the
21 deposition, Judge. I've never had a Rule 27 hearing either
22 because I've always entered into agreements with opposing
23 counsel in every one. Often in a case like this where the
24 other side has unique access to the witness and I cannot
25 contact the witness about the subject matter of his

1 testimony, it's been agreed to by the parties to have a
2 essentially discovery deposition for some limited period of
3 time at first, and then the preservation testimony with a
4 much more limited cross-examination than the deposition
5 testimony would have been, knowing that that deposition
6 will be used in a trial, or in multiple trials perhaps.
7 And we had set this up in that way in October when this
8 deposition was first going to be scheduled. Mr. McGrath
9 was made available.

10 THE COURT: You mean with respect to the state
11 case?

12 MR. BECK: It was at least in respect to the
13 state case, there was some discussion, I don't know if the
14 United States had been involved yet or not. But we
15 subpoenaed Mr. McGrath for the day before the day Cotter
16 wanted to depose him. The subpoena was served in Maine and
17 is not operative in Florida by any means. But what I'm
18 asking for, Your Honor, is to consider since Rule 27 gives
19 Your Honor control over the manner in taking the deposition
20 in whatever way Your Honor believes is reasonable, we would
21 ask that you allow the parties who haven't had a chance to
22 talk to Mr. McGrath to ask their discovery questions first,
23 and then let Mr. McGahren or his partner, whomever takes
24 the deposition, preserve the testimony, and let the
25 cross-examination come in on a crisper more brief way. I

1 don't think the overall deposition will be lengthened, it
2 would be shortened, but the defense will ask better
3 questions that are more useful if it's done that way, and
4 that's the way I've had it done every other time and it's
5 the way we had set up when we were going to do it in Maine
6 in October. So that's our request that the parties
7 appearing at the deposition, other than Cotter, be able to
8 ask some questions first before we start the preservation
9 deposition.

10 MR. MCGAHREN: Yes, Your Honor. And what I would
11 suggest is that they do that on day one. We want to start
12 out with a fresh witness, because we are taking a trial
13 deposition, on day two.

14 MR. BECK: That's perfect.

15 THE COURT: Everybody agreeable to that?

16 MR. DUPRE: My apologies. I'm a little
17 confused. So Mr. McGahren, are you fine with Bridgeton
18 taking a deposition -- excuse me, a fact deposition first?

19 MR. MCGAHREN: I said what I said, which is day
20 one he can take a discovery deposition, everyone can ask
21 their discovery questions. Day two, I want to start with
22 the witness fresh, first thing in the morning.

23 MR. BECK: Thank you for that clarification.

24 THE COURT: So day one would be discovery
25 deposition; day two would be the deposition for purpose of

1 preserving the testimony, with the understanding that the
2 deposition would potentially remain open for the parties to
3 come and tell me, based upon the record that is developed
4 at the deposition, why additional information or testimony
5 is appropriate.

6 MR. BECK: Of course.

7 THE COURT: Does that work for everyone?

8 MR. MCGAHREN: Yes, Your Honor.

9 MR. DUPRE: Yes, Your Honor.

10 MR. BECK: Thank you.

11 THE COURT: Anyone on the telephone want to weigh
12 in?

13 MR. SODEN: Your Honor, just fact checking a
14 little bit. Was it the Court's understanding that the
15 parties are going to talk this week before the deposition
16 to try to define Cotter's use for this testimony, or have
17 we passed by that?

18 THE COURT: Well, I encourage you all to have
19 that discussion because I think that the other parties here
20 who are listed as the defendants in this matter, you ought
21 to sit down with Cotter and have a discussion and say are
22 you seeking to do this, are you seeking to do that, because
23 Cotter may or may not be in a position to say, no, to some
24 of those things which may cause the parties to have more
25 comfort with respect to the future use of the deposition.

1 If Cotter's response is, I don't know, I can't tell you
2 that, then I suggest you all are going to have to go
3 forward with the deposition and that you all will be free
4 to make whatever arguments you are seeking to make to me
5 and/or the state court judge after this deposition has been
6 taken. And some day if and when it is relevant and someone
7 is seeking to use this deposition, other issues can be
8 determined at that time depending upon what purpose the
9 deposition is being offered for at that time. Because all
10 I would be looking at is whether we have a waiver, which is
11 going to subject Cotter to making further disclosure to the
12 parties. I am not going to limit the subject matter of
13 that deposition for any future trial unless you all agree
14 to that limitation, in which case I will memorialize your
15 stipulation. But the use to which that deposition can be
16 put at a future date is going to be a decision that that
17 judge is going to make on that future date. I will not
18 place any limitation on the use of the deposition at this
19 point in time. I will simply be making a determination
20 whether a full and fair opportunity to depose the witness
21 has been provided.

22 MR. BECK: Thank you.

23 THE COURT: Does that make sense?

24 MR. MCGAHREN: Yes, Your Honor. Thank you.

25 THE COURT: I know there was a -- so to the

1 extent anyone is asking me to limit it, I'm not going to do
2 so at this point because I don't think that that is my job
3 at this point. I think you all have a pretty clear
4 indication and a pretty full record of the subject matter
5 of the deposition and the questioning that Cotter intends
6 to ask. So I don't think that anybody can claim surprise
7 with respect to that.

8 MR. SODEN: Your Honor, thank you for that
9 clarification. This is Steve Soden again. But to be clear
10 on the operation of Rule 27, the deposition for future use
11 in federal cases is not limited to the Cotter petition and
12 the facts alleged in there.

13 THE COURT: I'm sorry, I have to tell you that I
14 didn't quite hear all that you said. So if I could get you
15 to repeat it, please.

16 MR. SODEN: Okay. Just because it is a Rule 27
17 and they have filed a petition outlining the facts to
18 elicit, that the deposition itself in future federal court
19 should be limited to the petition, the facts alleged in the
20 petition.

21 MR. MCGAHREN: Does that mean you are taking the
22 position Mallinckrodt couldn't use it for anything else?

23 MR. SODEN: The deposition itself limited to and
24 for use in future federal court proceedings, then the Rule
25 27 should be limited to the petition.

1 MR. MCGAHREN: The rule speaks to reasonable
2 uses, and as I said, Your Honor, I can't predict the
3 future. We do have two tolling agreements which we
4 disclosed in our petition that have been entered into the
5 United States, one of which deals with claims under CERCLA
6 for Latty Avenue, and the other which deals with claims
7 under CERCLA for Westlake Landfill. So we know about
8 those. We've also identified that there are toxic tort
9 cases, numerous toxic tort cases out there, including some
10 before Your Honor. So we have disclosed everything that we
11 know and I believe the rule is confined to using it for
12 reasonable uses and I think we've been reasonable in our
13 disclosure.

14 MR. SODEN: Your Honor, Rule 27 explicitly by its
15 terms applies only to cases not yet filed. So as far as
16 the toxic tort cases out there, other than Strong, would
17 not apply, would not apply to McClurg. The first line of
18 Rule 27 puts McClurg outside the scope of anything that's
19 going on here.

20 THE COURT: And I have to tell you folks, you are
21 referencing an issue that I have not looked at so I'm not
22 sure I understand what the issue is.

23 MR. MCGAHREN: It wasn't raised in Mallinckrodt's
24 papers. They sought to preclude the use of the deposition
25 against Mallinckrodt in their papers, so I'm hearing this

1 for the first time as well, Your Honor. I'm not quite
2 sure --

3 MR. SODEN: To be clear, all I'm asking is in
4 response to the Court's statement that she's not going to
5 put limits on the deposition, is that the deposition for
6 any future use in federal court is limited to the petition
7 filed under Rule 27 because that's how it works. You file
8 your petition and say this is what it's going to be about
9 and that's what allows you to perpetuate the testimony in
10 what would otherwise be a very unfair situation. So you
11 give everybody the facts and go take your deposition based
12 on those facts, and then its future use is limited to the
13 scope of that petition.

14 THE COURT: The scope of what petition? The Rule
15 26 (sic) petition?

16 MR. SODEN: Yeah, Cotter's Rule 27 petition.
17 Sets forth their alleged facts for the Basis of
18 perpetuating the testimony. It's in paragraph 6 of their
19 Rule 27 petition.

20 MR. MCGAHREN: He said paragraph 26?

21 THE COURT: Paragraph 6 of the Rule 27, so
22 document number one, paragraph 6.

23 MR. MCGAHREN: Okay. The petition also mentions
24 the Strong case.

25 MR. SODEN: The petition mentions the Strong

1 case, but we're here on Rule 27 and perpetuating the
2 testimony for future use in federal court. And Rule
3 27(a)(1)(A) says that the petition must state that the
4 petitioner expects to be a party to an action recognizable
5 in a United States Court but cannot presently bring it or
6 cause it to be brought. Does not apply to pending
7 actions.

8 MR. MCGAHREN: There is another case, Your Honor,
9 which is currently in mediation and we have signed a
10 mediation agreement. This involves the tolled claims by
11 the United States for the Westlake Landfill. Mr. Beck's
12 client has also brought a contribution action which has
13 been swept under conundrum of that mediation where
14 Bridgeton Landfill sued Mallinckrodt and EverZinc for
15 contribution under CERCLA. My client, Cotter, is not
16 currently a party to that litigation, but we would
17 certainly seek to use the deposition if we did join that
18 litigation after the mediation concludes in one manner or
19 another. But I don't know, Your Honor, what lawsuits are
20 going to happen in the future. I'm only aware of the
21 existing actions, and we've done the best we can to
22 identify reasonable uses of the deposition which is what
23 Rule 27 requires.

24 THE COURT: Are there particular topics that you
25 intend to inquire with respect to Mr. McGrath that are not

1 listed in the petition?

2 MR. MCGAHREN: I think the facts are basically
3 the same, Your Honor, it's just that they might get
4 transposed and used differently in different litigations
5 depending on the legal issues.

6 THE COURT: Do you feel that the petition that
7 you have filed with respect to the Rule 27 -- does Cotter
8 have any problem being limited to what is in the Rule 27
9 petition to the extent that that position is being used in
10 future federal action?

11 MR. MCGAHREN: So long as that's how all parties
12 are limited. We've laid out what the facts were that this
13 witness was going to testify to to the best of our ability.
14 At the deposition there may be questions asked.

15 THE COURT: I mean, Mr. Soden, I feel like
16 there's something else going on here that you know about
17 that I don't know about. And honestly, I do not understand
18 what the purpose of this questioning is, and I feel like
19 maybe I'm in the position of getting sandbagged here and I
20 don't want that to happen.

21 MR. SODEN: No, I'm not trying --

22 THE COURT: I don't get it. I don't get what
23 we're talking about. My understanding here is that Cotter
24 has requested to take this deposition. It has in a fair
25 amount of detail laid out the topics that it intends to

1 explore. Those topics are further elucidated in the
2 affidavit that was filed that everybody is going to be free
3 to inquire about. And it's my understanding that this
4 deposition will also be taken for a second purpose which is
5 for use in the Strong case. I don't know diddly squat
6 about the Strong case. I do not know what the issues are
7 there. I do not know how those issues may diverge from the
8 issues that are raised in this petition. But my
9 understanding is that the parties anticipated that both --
10 that Mr. McGrath would be -- the parties would be seeking
11 testimony with respect to both matters. And so I'm
12 assuming unless somehow the Strong case is identical to
13 these hypothetical cases that maybe have not been filed
14 yet, that there may be topics that are inquired about that
15 are relevant to the Strong case that would otherwise not
16 have been detailed in the Rule 27 petition. And are we
17 going to sit around and be parsing every question as it is
18 asked to make that determination?

19 MR. SODEN: No, Your Honor. I'm not trying to
20 sandbag, I'm not trying to clog up the works. They could
21 very well be relevant in Strong that are not covered by the
22 Rule 27 petition. That would not be grounds for an
23 objection to a deposition being taken in Strong, I suppose.
24 I'm just talking about the operation of Rule 27 and its
25 perpetration of testimony for future use in federal court.

1 So if that did happen, there are questions outside the
2 bounds of the petition, that would be testimony that would
3 not carry forward under Rule 27 and be able to be used
4 against the parties who have been noticed up in this
5 proceeding. Because I'm not a part of Strong either --

6 THE COURT: Mr. Soden, why don't you tell me a
7 hypothetical question that you are concerned about. I
8 just --

9 MR. SODEN: For example, anything about
10 Mallinckrodt, my client, there is nothing in the petition
11 about that. I don't know if people are going to ask
12 Mr. McGrath about Mallinckrodt, but that's not part of the
13 petition and that should not be part of any testimony that
14 is perpetuated.

15 MR. MCGAHREN: I think the petition does mention
16 Mallinckrodt, but I don't believe that that's going to be a
17 subject of this witness's knowledge.

18 THE COURT: Well, Mr. Soden, I'm going to assume
19 that we're not going to have a whole lot of irrelevant
20 questions asked here, but as you know, this deposition is
21 being taken for the purpose of preserving testimony.
22 Nobody is making a determination as to its use now. And if
23 in fact there is questioning that takes place that you
24 believe is reasonably outside the scope of the Strong
25 litigation and outside the scope of the Rule 27 petition,

1 then I suggest that you make an objection to preserve it
2 for the record. And some day some judge will determine
3 whether that was a good objection and whether that
4 testimony will be permitted.

5 MR. SODEN: Thank you, Your Honor. I was just
6 mainly wanting to clarify their comments about no
7 limitations.

8 MR. MCGAHREN: There are other litigations out
9 there, Your Honor, that we haven't been named in these
10 litigations. There's a Kitchin lawsuit that has been
11 brought against Mr. Beck's client, or at least some of
12 them, for Westlake Landfill, which was remanded to state
13 court, is now before the Eighth Circuit on a limited issue
14 that I can't speak to. We haven't been joined in that
15 case. It may end up in federal court, it may end up in
16 state court, I just don't know, Your Honor, I can't predict
17 that.

18 THE COURT: All right. As you stand here today,
19 are there issues with respect to Mallinckrodt that you
20 anticipate asking Mr. McGrath?

21 MR. MCGAHREN: I don't think Mr. McGrath knows
22 anything about Mallinckrodt other than the fact that they
23 generated all the waste at issue.

24 THE COURT: And I saw reference to that in the
25 affidavit.

1 MR. MCGAHREN: Yes, Your Honor. It's
2 identified.

3 THE COURT: So that fact has been stated in the
4 affidavit that Mr. McGrath may or may not be asked about.
5 But in the event that Cotter intends to ask some line of
6 questions with respect to Mallinckrodt, I am going to ask
7 Cotter to disclose the line of questioning that it intends
8 to ask in advance of the deposition. Any problem with
9 that?

10 MR. MCGAHREN: No, Your Honor.

11 THE COURT: Does that take care of you Mr. Soden?

12 MR. SODEN: Yes, Your Honor. Thank you.

13 THE COURT: And I don't mean to limit your
14 ability to make an objection. You all will be free to
15 preserve your objections for the record so that some judge
16 some day can make a determination whether that question and
17 answer will be permitted to be offered to the jury. Okay?

18 MR. SODEN: Yes.

19 THE COURT: All right. Now, after this
20 deposition is taken I assume that you all will be in a
21 position to have some sense of the issues that you may want
22 still to present to me, if at all. And so please then
23 communicate with one another with respect to those issues
24 and try to reach an agreement with respect to any further
25 briefing and the schedule for that further briefing, and

1 hopefully present that to me. If there are aspects of it
2 that you can agree to and others not, then set that out.
3 If it would be helpful for us to have some form of
4 conference call in advance of you all moving forward, we
5 can do that.

6 I will tell you I'm scheduled to be in meetings
7 in Washington the third, fourth, and fifth of December, so
8 I will not be available those days. I think we have
9 hearings in McClurg on the sixth, so I'll be seeing at
10 least some of you then. And, you know, I'll be back
11 available after that, but do not assume you will be able to
12 reach me on the third, fourth, or fifth of December. But
13 if it would be helpful to you all to have some sort of
14 conference call to discuss how to proceed, feel free to
15 call my assistant and set that up. And otherwise, please
16 do attempt to agree on some form of briefing schedule if
17 there is anything further, and if you all decide as a
18 holiday present to me that there is nothing further that
19 you need from me, please let me know that as well.

20 MR. MCGAHREN: Thank you, Your Honor.

21 THE COURT: All right. Thank you all. Anything
22 further from anyone on the phone? All right. I'm going to
23 take that as a no. And we will be adjourned. Thank you.

24 (COURT ADJOURNED AT 5:50)

25

REPORTER'S CERTIFICATE

I, Patti Dunn Wecke, Registered Merit Reporter, hereby certify that I am a duly appointed official court reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the entitled cause, and a true and correct transcription of my stenographic notes.

I further certify that this transcript, containing pages 1 - 58 inclusive, was delivered electronically and that this reporter takes no responsibility for missing or altered pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 30th day of November, 2019.

/s/Patti Dunn Wecke, RMR, CRR, CMRS
Official Reporter